RAMLI SHAHDAN & ANOR

v.

MOTOR INSURER'S BUREAU OF WEST MALAYSIA & ANOR

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
PAJAN SINGH GILL JCA
RAHMAH HUSSAIN JCA
[CIVIL APPEAL NO: N-01-75-1999]
8 SEPTEMBER 2005

CONTRACT: *Privity - Exception - Contract made between two parties for benefit of third party - Rights of third party*

CONTRACT: *Rescission - Mutual agreement - Whether agreement is extinguished when recinded by mutual agreement of both parties and substituted with new agreement*

DAMAGES: *Personal injuries - Uninsured motorist - Claim against Motor Insurers Bureau of Malaysia - Whether claim can be pursued if judgment obtained after 31 December 1991*

This appeal concerned the impact of two agreements signed between the 1st and 2nd respondents as against the rights of the 1st and 2nd appellants. The said agreements are referred to as the 1st agreement and 2nd agreement respectively.

The 1st appellant was riding his motorcycle when he was collided into by another motorcycle bearing registration number NF 7486 ridden from the opposite direction by a motorcyclist who had no third party risk coverage at the time of the accident. The 2nd appellant was the pillion rider of the 1st appellant, and both appellants suffered grave injuries as a consequence of the collision. On 6 May 1988 the appellant's solicitors wrote to the 1st respondent to give them notice that the appellants were instituting proceedings against Wan Kon Chah, the rider of the motorcycle, registration number NF 7486. Court proceedings were then commenced at the Seremban High Court by the appellants, and a copy of the said summons was served on the 1st respondent.

On 1 January 1992 a new agreement was entered into between the 1st respondent and the 2nd respondent. Clause 3 of this 2nd agreement provided as follows "This agreement shall apply to all claims preferred against the Bureau excluding any court awards which remain unsatisfied as at 1 January 1992."

On 3 September 1993, judgment was entered against the uninsured rider of motorcycle, NF 7486 at the High Court at Seremban. Armed with the judgment, the appellants' solicitors wrote to the 1st respondent on 11 October 1993 and 12 November 1993, making no reference to the judgment obtained, but instead referred to the claim forms which had been earlier sent to the 1st respondent, and requesting an amicable settlement to the matter. On 19 November 1993, the 1st respondent wrote back offering the appellants a compassionate sum of RM8,200 to Ramli bin Shahdan and RM4,450 to Lim Chong Lai. Dissatisfied with this proposal, appellant's solicitors filed an originating summons against the 1st and 2nd respondents.

The 1st respondent raised the issue for locus of the appellants to sue, as the appellants were not parties to the 1st and 2nd agreements, and had not given any consideration on the said agreement. Another issue arising was in relation to the validity of the 1st and 2nd agreements. The appellants' counsel argued that the collision occurred during the tenure of the 1st agreement, and through the correspondence that ensued, they were entitled to the full advantage of the 1st agreement, namely cl. (2) which would entitle the appellant in whose favour judgment was obtained of any sum payable thereunder.

Held (dismissing the appeal with costs)
Per Pajan Singh Gill JCA:

[1] When a contract as in the present case is made between the 1st respondent and 2nd respondent for the benefit of the appellants, then the 2nd respondent can sue on the contract for the benefit of the appellants, and recover all that the appellants would have recovered as if the contract had been made by the appellant himself. If the 2nd respondent fails in his duty, the appellants as beneficiaries under the implied trust, may successfully maintain an action against the 1st respondent and 2nd respondent as joint defendants. This issue of locus of the appellants, to sue, was for purposes of the appeal *cadit quaestio.*

[2] From the purport of both the 1st and 2nd agreements it was the intention of the contracting parties that the 1st agreement be terminated, and be substituted by the 2nd agreement. From a plain reading of cl. 1(b) of the 2nd agreement, there was an unequivocal intention by both the 1st and 2nd respondents to mutually rescind the 1st agreement. The effect of such a recession by mutual agreement is clear, the first contract is extinguished. This is unlike a variation, when the old contract continues to exist in the altered form. The 2nd agreement nullified the effect of the 1st agreement making it inoperative. Therefore, the submissions of the appellant that they were entitled to their rights in damages as per the 1st agreement was "dead in the water", as there was no obligation on the 1st and 2nd respondents to perform any bargain or obligations under the 1st agreement.

[3] The effective date of the judgment entered in favour of the appellant against the uninsured party also militated against the submissions of the appellants that they were entitled to their claims under the 1st agreement. For the purpose of the agreements in question, what was imperative for purposes of enforcement against the 1st respondent was a "judgment". The effective judgment in this respect was dated 3 September 1993, which in effect took the judgment out of the compass of the 1st agreement that was deemed ineffective at that point of time. Bearing in mind the date of the judgment, the termination of the 1st agreement on 31 December 1991 and cl. 3 of the 2nd agreement, the said judgment fell out of the sphere of the 1st and 2nd agreements.

Case(s) referred to:

Gregory and Parker v. William [1817] 3 Mer 582 ***(refd)***
Gurtner v. Circuit [1968] Vol 1 Lloyd's Law Reports 171 ***(refd)***
New Indian Assurance Co Ltd v. Simirah [1966] 2 MLJ 4 ***(refd)***
Polygram Records Sdn Bhd v. The Search & Anor [1994] 3 CLJ 806 HC ***(refd)***
Tomlinson v. Gill [1756] Amb 330 ***(refd)***
United Dominions Corp (Jamaica) Ltd v. Michael Mitri Shouciar [1969] 1 AC 340 ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 63

For the appellant - Manian Raju (D Krishna with him); M/s Gunaretnam & Co

For the 1st respondent - Kanagasabapathi (Woo Kok Wai with him); M/s Kenaga, Suresh & Co

For the 2nd respondent - Mary Lim (Maheran Md Isa & Mohaji Selamat with her)

Reported by Amutha Suppayah

JUDGMENT

Pajan Singh Gill JCA:

In this appeal before us, we were called upon basically to determine the impact of two agreements signed between the 1st and 2nd respondents as against the rights of the 1st and 2nd appellants.

For the purpose of this judgment, the said agreements have been referred to as the 1st agreement and 2nd agreement respectively.

Historical Background

The Motor Insurers Bureau of Malaysia was conceived in social justice and was born into the then, Road Traffic Ordinance 1958 (now The Road Traffic Act 1987). The basis of this provision in the said ordinance was to recognise to some extent the unfortunate position of victims of road accidents, where experience has shown, by reason of legal technicalities, that innocent victims, despite the requirements of Compulsory Third Party Insurance, failed to obtain any compensation. See *New Indian Assurance Co. Ltd v. Simirah* [1966] 2 MLJ p. 4.

Mechanism Involved In The Setting Up Of Motor Insurers Bureau

The Motor Insurers Bureau does not exist as an Insurance Company, but is premised on an agreement entered into on 15 January 1968, between the Bureau and the Minister of Transport. It states in so far as is material, that:

> ... the Bureau will, subject to the provisions of these presents, pay or cause to be paid to the person or persons in whose favour such judgment was given any sum payable or remaining payable thereunder in respect of the aforesaid liability including taxed costs ... or satisfy or cause to be satisfied such judgment.

So much for the origins of the Motor Insurers Bureau and the manner in which it operates. Now to the issues at hand.

Chronology Of Event

In the present instance, the 1st appellant was riding a motorcycle, registration number NG 8397, along the Jalan Sepang, Salak road from the direction of Sepang to Salak on 4 May 1985 at about 7.30pm, whereupon he was collided into by a motorcycle, registration number NF 7486 ridden from the opposite direction. The said motorcyclist, Wong Kon Chah riding motorcycle, registration number NF 7486 had no third party risk coverage at the time of the accident. This is borne out by a letter dated 26 October 1985 written by the said Wong Kon Chah to the appellant's solicitors. The 2nd appellant was pillion rider of the 1st appellant, and both appellants apparently suffered grave injuries as a consequence of the collision.

Following a letter dated 26 October 1985, from the said Wong Kon Chah, the appellant's solicitors Messrs Gunaretnam & Co. at the behest of the appellant wrote to the 1st respondent, putting him on notice that the appellant's solicitors were in the process of commencing proceedings against the 1st respondent.

After a series of correspondences between the appellant's solicitors and the 1st respondent; on 6 May 1988 the appellant's solicitors wrote to the 1st respondent to give them notice that the appellants were instituting proceedings against Wan Kon Chah, the rider of the motorcycle, registration number NF 7486. The said letter bears reproduction:

GUNARETNAM & CO.
Advocates and Solicitors
No. 14, Jalan Dato' Abdul Rahman
(Jalan Wilkinson)
Seremban, N.S.

6th May, 1988

Claim File 579/86
G/V/5325 (VK)

A

Messrs Motor Insurers' Bureau
Of West Malaysia
3rd Floor, WismaPIAM
150, Jalan Tun Sambanthan
50470 Kuala Lumpur A.R. REGISTERED

B

Dear Sirs,

Re: Notice to Motor Insurers Bureau of West Malaysia of proceedings against An uninsured owner of vehicle

C

As Solicitors for and on behalf of Ramli bin Shahdan of 26, Peringkat 11, Kg. LBJ, 71760 Seremban and Lim Chong Lai of 144, Taman Salak, Sepang, Selangor, we hereby give you Notice pursuant to the Agreement dated the 12th day of December, 1967 made between the Minister of Transport of the one part and the Motor Insurers Bureau of the other part, that the said Ramli bin

D

Shahdan and Lim Chong Lai intend to institute proceedings in Court against Wan Kon Cha, 79, Ladang Bute, Nilai Pos, Seremban, for damages in respect of personal injuries arising out of a motor vehicle accident involving a motorcycle bearing registration number NF 7486 belonging to the said Wan Kon Chah which said vehicle was at all material time uninsured.

E

Dated the 6th day of May, 1988.

Yours faithfully,

Sgd: xxx

F

Court proceedings *vide* Civil Action 23-73-90 were then commenced at Seremban High Court by the appellant, and a copy of the said summons was served on the 1st respondent.

G

On 19 July 1990, the 1st respondent wrote to the appellant wherein reference was made in the said letter to cl. 6(d) of the 1st agreement, and simultaneously proposing an out of court settlement. Once again, it is pertinent that the said letter be reproduced:

H

I

MOTOR INSURERS' BUREAU OF WEST MALAYSIA

Telephone: 2747395/6/7/8/9
Cable: PERINSURAN KUALA LUMPUR

Registered Office: 3rd Floor
Wisma PIAM
150, Jalan Tun Sambanthan
50470 Kuala Lumpur
Postal Address: P.O. Box
12555
50782 Kuala Lumpur

Your Ref: G/V/5325(VS)

19th July, 1990

M/s Gunaremam & Co.,
14, Jalan Dato' Abdul Rahman
70000 SEREMBAN

Dear Sirs,

Re: Our Ref: Claim File 579/86 Accident on 3.5.1985 involving motor cycle NG 8397 and NF 7486

We refer to your letter of 31st May, 1990 together with a copy of the Summons.

Please let us have your clients minimum quantifications for settlement out of Court.

Meanwhile no doubt actions have been filed in Court, we appreciate that you withhold further Court proceedings to the matter – Clause 6(d) of the MIB Agreement refers.

We await your reply,

Yours faithfully,

By Order of the Council

Sgd. xxx
Senior Claims Executive

On 19 September 1990 Messrs Wong Seng Chow, Nagarajah & Co. wrote to the appellant's solicitors informing them that they had been retained as solicitors for the 1st respondent, and had instructions to accept service of process in respect of this matter. Thereupon a flurry of correspondence was exchanged between the solicitors and from what we gather, the appellants were moving towards setting the action down for trial in the High Court of Seremban. The agreed and disagreed bundle of documents were for instance, filed in court.

However, on 16 January 1992, a letter was issued from the office of 1st respondent's solicitors which is reproduced:

Wong Seng Chow, Nagarajah & Co.
Peguambela & Peguamcara
Advocates & Solicitors

Partners
Dato' Wong Seng Chow
Miss Nagarajah

First Floor
Standard Chartered
Bank Chambers
Jalan Dato' Bandar
Tunggal
70000 Seremban
Negeri Sembilan
Malaysia

Your Ref: KG/V/5325
Our Ref: (NR) 90185 (MIB)

16th January, 1992

BY HAND

Without Prejudice

Messrs. Gunaretnam & Co.
Advocates and Solicitors
No. 14, Jalan Dato' Abdul Rahman
(Jalan Wilkinson)
70000, Seremban

Dear Sirs,

Re: Seremban High Court Sivil Suit
Number 23-73 of 1990

We refer to the above captioned matter.

We have been instructed by our clients the Motor Insurers' Bureau of West Malaysia to enquire as to whether your clients are amenable to an early settlement of the above suit. If so, kindly let us have your views on liability and the minimum figures your clients have in mind for a quick settlement.

Please let us have a reply at your earliest convenience.

Yours faithfully,

Sgd: xxx
c.c.
Claims Executive
Motor Insurers' Bureau of West Malaysia
3rd Floor, Wisma PIAM
150, Jalan Tun Sambanthan
50470 Kuala Lumpur (Ref: Claim File 579/86)

The appellant's solicitors in response to the request for settlement, on 5 May 1992 wrote a rather detailed opinion to the 1st respondent, setting out the extent of injuries to both the appellants, and suggesting in the said letter a region for settlement on both general and special damages.

There was, however, a turn of event for the course of the correspondence as a new agreement on 1 January 1992 was entered into between the 1st respondent and the 2nd respondent, resulting in the termination of the services of Messrs. Wong Seng Chow, Nagarajah & Co. as solicitors for the respondent.

From the correspondence that crystallized, the application for withdrawal of solicitors of Wong Seng Chow, Nagarajah & Co. was scheduled for hearing on 25 September 1992, but despite this, the appellant's solicitors diligently kept writing to the respondent's solicitors, requesting a reply to their proposal for settlement. Eventually, a court order of 11 December 1992 granting the firm of Wong Seng Chow, Nagarajah & Co. withdrawal of services, was obtained and served on the appellant's solicitors in February 1993.

From that date forward, the appellant's solicitors wrote directly to the 1st respondent informing them about the progress of the case, in terms of fixing the dates of the case at the Seremban High Court. Of pertinence is a letter dated 7 May 1993 wherein the appellant had informed the 1st respondent that they were proceeding to trial, to obtain judgment against the uninsured party, and thereafter seek to enforce the judgment against the 1st respondent.

In response to this, the 1st respondent by letter on 12 May 1993 had this to say:

MOTOR INSURERS' BUREAU OF
WEST MALAYSIA

Telephone: 2747395/6/8/9
Cables: PERINSURAN KUALA LUMPUR

Registered Office: 3rd Floor
Wisma PIAM
150, Jalan Tun Sambanthan
50470 Kuala Lumpur
Postal Address:P.O. Box 12555
50782 Kuala Lumpur

Your Ref: M/V/5324
12th May 1993

M/s Gunaremam & Co.
14, Jalan Dato' Abdul Rahman
70000 SEREMBAN

Dear Sirs,

Re: Our Ref: Claim File 579/86
Accident on 3.5.1985 involving
Motor cycles NG 8397 and NF 7486

We refer to your letter of 7th May 1993.

The Bureau is not responsible for the Judgment which you intend to obtain this case. Please refer the same direct to the Defendant.

WITHOUT PREJUDICE

Nonetheless, if your clients wish the Bureau to consider their claim, please request each of them to complete and return our Claim Form (2 sets are enclosed).

Yours faithfully,

By Order of the Council

Sgd: xxx
Secretary

In compliance, however, to the aforesaid letter in respect of the claim forms, the appellant's solicitors had on 6 July 1993, completed and executed the said claim forms of the 1st and 2nd appellants. We interject by stating here that the act of the appellants in completing the claim forms, did have a bearing on the outcome of this decision. We would elaborate on this aspect in the latter part of our judgment. For the record, the claim forms were annexed and adduced in evidence.

On receipt of the said forms, the 1st respondent wrote to the appellant's solicitors on 19 July 1993 and the letter reads as follows:

MOTOR INSURERS' BUREAU OF WEST MALAYSIA

Telephone: 2747395/6/7/9
Cables: PERINSURAN KUALA LUMPUR

Registered Office, 3rd Floor
Wisma PIAM
150, Jalan Tun Sambanthan
50470 Kuala Lumpur
Postal Address:P.O.Box 12555
50782 Kuala Lumpur

Your Ref: M/V/5325
19th July 1993

M/s Gunaretnam & Co.
14, Jalan Dato' Abdul Rahman
70000 SEREMBAN

Dear Sirs,

Re: Our Ref: Claim File 579/86
Accident on 3.5.1985 involving
Motor cycles NG 8397 and NF 7486

We refer to your letter of 6th June 1993.

A The matter shall be referred to the Bureau's Council and we shall revert to you on their decision in due course.

Yours faithfully,
By Order of the Council

B Sgd:
Secretary

Whilst this was in progress, on 2 August 1993, Messrs W.M. Cheong & Associates came on record as solicitors for the 1st respondent, and filed the notice of change of solicitors.

C

On 3 September 1993, judgment was entered against the uninsured rider of motorcycle, NF 7486 at the High Court of Seremban. Counsel for the appellants was present, and one Mr. Sundra Siva, who was present, presumably acting on behalf of the 1st respondent.

D

Armed with the judgment, the appellant's solicitors wrote to the 1st respondent on 11 October 1993 and 12 November 1993, making no reference to the judgment obtained, but instead referred to the claim forms sent by the 1st respondent, and requesting an amicable settlement to the matter.

E

On 19 November 1993, the 1st respondent wrote in response to the previous letter of the appellant and this letter reads as follows:

F MOTOR INSURERS' BUREAU OF WEST MALAYSIA

Telephone:2747395/6/7/8/9
Cables: PERINSURAN KUALA LUMPUR

G Registered Office: 3rd Floor
Wisma PIAM
150, Jalan Tun Sambanthan
50470 Kuala Lumpur
Postal Address:P.O.Box 12555
50782 Kuala Lumpur

H Your Ref: M/V/5324
Our Ref: Claim File 579/86

I

WITHOUT PREJUDICE

19th November 1993

M/s Gunaretnam & Co.
Jalan Dato' Abdul Rahman
70000 SEREMBAN

Dear Sirs,

Re: Accident on 3.5.1985 involving M/cycle NG 8397 and m/cycle NF 7486

We refer to our letter dated 10th November 1993.

We are pleased to inform that the Bureau's Council upon consideration of your client's claim has agreed to award a compassionate sum of RM8,200.00 to Ramli bin Shahdan and RM4,450.00 to Lim Chong Lai.

Kindly provide us with a copy of your client's I/C (both sides) to enable us to prepare the necessary Discharge Papers for their completion.

Do let us have the above document within 3 months from the date hereof failing which we would assume your client's is not interested in the above matter and close our file accordingly.

Yours faithfully,

By Order of the Council

Sgd: xxx
Claims Executive

Obviously dissatisfied with this proposal, the indefatigable appellant's solicitors, then embarked in correspondence with the Minister of Transport.

Not having a favourable reply to the latest correspondence, must have been the proverbial "straw that broke the camel's back", for an originating summons been filed thereafter on 27 March 1995 against the 1st and 2nd respondents.

We have deliberately laid out rather laboriously the series of conduct and correspondence between the parties, as we find that it has an important bearing to the issues of law that were argued during the appeal before us, and before the trial judge.

Now what are the issues of law?

Privity Of Contract, Do The Plaintiffs Have A Locus To Sue?

Admittedly this area of law was not argued in great detail, whilst the matter was heard on appeal, but we wish all the same to comment on it. Suffice to say, in the court below, issue was taken by the 1st respondent on the locus of the appellants to sue, as the appellants were not parties to the 1st and 2nd agreement, and had not given any consideration to the said agreement.

To this issue, we universally adopt the views propounded by the erudite judge Lord Denning, who we note treated the relationship and position of a Motor Insurers Bureau as a unique entity, a league of its own, so to speak, which goes against convential wisdom, in area of privity of contract. In *Gunner v. Circuit* [1968] Vol. 1, Lloyd's Law Reports 171 (Court of Appeal) at 176, Lord Denning held:

> Then the plaintiff will be able to come down on the Motor Insurers' Bureau and call upon them to pay because they have made a solemn agreement that they will pay ...
>
> It is true that the injured person was not a party to that agreement between the Bureau and the Minister of Transport and he cannot sue in his own name for the benefit of it. *But the Minister of Transport can sue for specific performance of it.*
>
> *He can compel the Bureau to honour its agreement by paving the injured person, see Beswick v. Beswick [19671 3 WLR 932,* (emphasis added). If the Minister of Transport obtains an order for specific performance, the injured person can enforce it for his own benefit, see by Lord Pearce in [1967] 3 WLR, at p. 952 E. to G. *If the Minister of Transport should hesitate to sue, I think it may be open to the plaintiff to make him a defendant: and thus compel performance ...* (emphasis added).

On our part we are aware that the doctrine of privity, while not an irrational doctrine from the nature of a contract, has in particular incidence caused injustice and proved inadequate to modern needs. In such circumstances, it is not surprising that various attempts have been made to induce courts to sanction evasions of the doctrine.

Reported case laws had indicated a considerable measure of success in this respect. It has been observed for instance that an undisclosed principal could sue on a contract made by another. By the rules governing negotiable instruments, it has long been established, first by custom of law merchant, then by judicial decision, and finally by statute that a third party may sue on a basis of exchange or a cheque. Equally, we find in the sphere of insurance, there are several situations where a policy may avail for the benefit of persons who have not themselves effected the policy. Further, the usage of trade and commerce have modified the rigours of common law doctrine of privity of contract.

Outside this scope, litigants have from time to time been able to invoke the assistance of equity.

As early as 1753, Lord Hardwicke indicated the possibilities of a trust situation being created. His Lordship was prepared, in a case where for example A promised to B to pay money to C, to regard B as trustee for C for the benefit of the contract. See *Tomlinson v. Gill* [1756] Amb 330.

In 1917, Sir William Grant affirmed the concept of the possibilities of a trust in the case of *Gregory and Parker v. William* [1817] 3 Mer. 582. In this case, Parker owed money to both Gregory and Williams. He agreed with Williams to assign to him the whole of his property, if Williams would pay the debt due to Gregory, but Williams failed to implement his promise. Gregory and Parker filed a bill in equity to compel performance of the promise and succeeded. It was held that Parker must be regarded as a trustee for Gregory, and he (Gregory) derived an equitable right through the mediation of Parker's agreement.

Against this backdrop we can say with equanimity that when a contract as in our present instance is made between 1st respondent and 2nd respondent for the benefit of the appellants, then 2nd respondent can sue on the contract for the benefit of the appellants, and recover all that the appellants would have recovered as of the contract had been made by the appellant himself. Implicit in this proposition of ours, is the fact that if the 2nd respondent fails in his duty, the appellants as beneficiaries under the implied trust, may successfully maintain an action against the 1st respondent and 2nd respondent as joint defendants. This issue of locus of the appellants, to sue, is for purposes of this appeal *cadit quaestio.*

A **Validity Of The 1st And 2nd Agreement**

The above issue was the central thrust of argument of both the appellant and respondent before us, and in the court below.

The 1st agreement dated 15 January 1968 was tendered as an B exhibit, and for clarity we reproduce:

> MEMORANDUM OF AN AGREEMENT made and entered into by and between TAN SRI HAJI SARDON BIN HAJI JUBIR, P.M.N. in his capacity as THE MINISTER OF TRANSPORT of the Government of Malaysia (hereinafter called C "the Minister") of the one part, and MOTOR INSURERS' BUREAU of WEST MALAYSIA a Company duly incorporated with limited liability according to the laws of MALAYSIA represented herein by YEOH TAT THONG he being duly authorized thereto by a Resolution of the Council bearing date the 12th day of December, 1967, (hereinafter called "the Bureau") of D the other part.
>
> WHEREAS the Minister and Those Insurers Authorised to Transact Compulsory Motor Vehicle Insurance in West Malaysia (hereinafter called "the Insurers") have agreed that the Bureau E should be incorporated under the Companies Act 1965 and that the parties should thereafter enter into the agreement set forth below.
>
> NOW THEREFORE THIS AGREEMENT WITNESSETH:
>
> F 1. THE operative date of this Agreement shall be fifteenth day of January, 1968.
>
> 2. IF judgment in respect of any liability which is required to be covered by a policy of insurance under Part IV of the Road Traffic Ordinance 1958 (hereinafter called "the G Ordinance") is obtained against any person or persons in any Court in West Malaysia and either at the time of the accident getting rise to such liability there is not in force a policy of insurance as required by the Ordinance or such policy is ineffective for any reason other than inability of the H Insurer to make payment and any such judgment is not satisfied in full within twenty-eight days from the date upon which the person or persons in whose favour such judgment was given became entitled to enforce it then the Bureau will, subject to the provisions of these presents, pay or cause to be paid to the person or persons in whose favour such I judgment was given any sum payable or remaining payable thereunder in respect of the aforesaid liability including taxed costs (or such portion thereof as relates to such liability) or satisfy or cause to be satisfied such judgment.

3. THIS Agreement may be terminated by the Minister at any time or by the Bureau on two years notice without prejudice to the continued operation of this Agreement in respect of accidents occurring before the date of termination.

4. THIS Agreement shall not apply if the injury or death giving rise to the claim resulted from an accident which occurred before the operative date of this Agreement.

5. NOTHING in this Agreement shall prevent the Insurers (or any of them) from providing by conditions in their contracts of insurance or by collateral agreements that all sums paid by them on behalf of the Bureau or by the Bureau by virtue of this Agreement in or towards the discharge of the liability of their policyholder shall be recoverable by them or by the Bureau from the policyholder or from any other person.

6. THE following shall be conditions precedent to the liability of the Bureau, namely:

   (a) That written notice of proceedings be given by registered post before commencement of such proceedings:

      (i) to the Insurer in any case in which there was in force at the time the accident occurred a policy of insurance purporting to cover the use of the vehicle, the existence of which is known before the commencement of proceedings to the person bringing such proceedings (hereinafter called "the Plaintiff).

      (ii) To the Bureau in any other case,

   (b) That a copy of any Summons, Declaration or any statement of claim which may be issued shall be supplied to the Insurer or the Bureau, as the case may be, and that the Plaintiff shall not seek to obtain judgment before the expiry of thirty days from the date the copy of such Summons, Declaration or statement of claim shall have been supplied to the Insurer or the Bureau, unless within the said period of thirty days the person against whom the Plaintiff has taken proceedings issues any process which would lead to the dismissal of such proceedings for want of prosecution.

   (c) That if so required by the Bureau and subject to full indemnity from the Bureau as to reasonable costs the Plaintiff shall take all reasonable steps to obtain judgment against any person against whom he may have a remedy in respect of or arising out of the injury or death giving rise to the aforesaid proceedings.

(d) That the Plaintiff shall comply with all requirements of the Bureau in relation to any matter which might give rise to a claim against the Bureau in terms of this Agreement, provided that the Plaintiff shall not be bound by the terms of this paragraph unless the requirements of the Bureau are in all the circumstances reasonable. In the event of any dispute as to the reasonableness of any requirement, the decision of the Minister shall be final and binding on all parties concerned.

(e) That the judgment or judgments (including such judgments as may be obtained under paragraph (c) of this Clause) shall be ceded to the Bureau or its nominee.

(f) That the Plaintiff shall give credit to the Bureau for any amount paid to him by or on behalf of the Defendant in respect of any liability for injury to or death of any person, arising out of the event which occasioned the claim against the Bureau. In the event of such amount including a sum in respect of loss of or damage to property, the amount of which is not separately specified then the amount of the credit to the Bureau shall be in the same proportion as the amount of the claim for injury or death of any persons bears to the total claim where such claims included an amount in respect of loss or damage to property.

7. WHEN notice of proceedings has been given under Clause 6 it shall be competent for the Bureau at any time before date set down for the hearing of the action to offer to the Plaintiff in full satisfaction of the obligation of the Bureau such sum as they consider sufficient in respect of any claim made together with the equivalent of the taxed costs to the date of such offer. If such offer is not accepted and in any ensuing action the Plaintiff is awarded in respect of his claim for injury to or death of any person not more than the sum offered under this Clause (exclusive of the sum for such costs) then in satisfaction of their undertaking under this Agreement the Bureau shall not be required to pay more than the total amount awarded together with the sum offered in respect of costs and shall be entitled to set off any costs incurred by them after the date of the offer against any amount awarded the Plaintiff.

8. (a) The acceptance of liability by the Bureau under Clause 2 in respect of any vehicle the use of which is required to be covered by a policy of insurance shall extend to the use of a vehicle to which Section 74 of the Ordinance does not apply by virtue of sub-section (5) of that Section only so long as there is in force a policy of insurance purporting to cover such use of the vehicle.

(b) For the purpose of this Clause such a vehicle which has been unlawfully removed from the possession of the person legally entitled to possession for the time being shall be taken to continue in that possession whilst it is so removed.

9. THIS Agreement shall not apply to the use of a vehicle:

(a) in respect of which there is a security complying with Section 77 of the ordinance.

(b) which has entered West Malaysia through the frontier with Thailand unless such vehicle is registered in accordance with Section 6 of the Road Traffic Ordinance, 1958 of West Malaysia or with Section 6 of the Road Traffic Ordinance, 1961 of the Republic of Singapore.

10. THE Minister undertakes to ensure that every person hereafter authorized as an Insurer for the purposes of Part IV of the Ordinance will undertake to become a member of the Bureau as a condition of such authorization.

11. IN this Agreement, "judgment" shall mean only a judgment in favour of the person who suffered bodily injury, his dependants or legal personal representative.

The 2nd agreement dated 1 January 1992 was in the words of the preamble to the said agreement, a substitute to the 1st agreement, and was deemed to have rescinded the 1st agreement. For full effect to the said Agreement is reproduced:

MEMORANDUM OF AN AGREEMENT
BETWEEN THE MINISTER OF TRANSPORT
AND THE MOTOR INSURERS' BUREAU OF
WEST MALAYSIA

MEMORANDUM OF AN AGREEMENT (hereinafter referred to as "the Agreement") made and entered into by and between Y.B. Dato' Seri Dr. Ling Liong Sik in his capacity as THE MINISTER OF TRANSPORT of the Government of Malaysia (hereinafter called "the Minister") of the one part,

and

MOTOR INSURERS' BUREAU OF WEST MALAYSIA, a Company duly incorporated with limited liability according to the laws of MALAYSIA represented herein by Mr. Lawrence Pereira he being duly authorized thereto by a Resolution of the Council bearing the date 9th January 1992 (hereinafter called "the Bureau") of the other part.

WHEREAS the Minister and the Bureau have agreed that the Agreement set forth below shall substitute the previous agreement between the parties that was entered into on the 16th day January 1968 (hereinafter referred to as the "Principal Agreement").

1. (a) The operative date of this Agreement shall be the 1st day of January 1992.

(b) The Minister of Transport and the Bureau shall be deemed to have mutually rescinded the Principal Agreement on the 31st day of December 1991.

2. The Bureau may subject to Clause 10 here of and upon application by a Claimant, consider to make at its absolute discretion, compassionate payments or allowances to persons injured and to the dependants of persons killed through the use of Motor Vehicles which do not have in force a policy of insurance as required under Part IV of the Road Transport Act 1987 (hereinafter referred to as "the Act") or where such policy is ineffective for any reason other than the inability of the insurer to make payment.

6. This Agreement shall apply to all claims preferred against the Bureau excluding any court awards which remain unsatisfied as at the 1st day of January 1992.

7. NOTHING in this Agreement shall prevent the Insurers (or any of them) from providing by conditions in their contracts of insurance or by collateral agreements that all sums paid by them on behalf of the Bureau or by the Bureau by virtue of this Agreement in or towards the discharge of the liability of their policyholder shall be recoverable by them or by the Bureau from the policyholder or from any other person.

8. Where legal proceedings have been commenced against any person or persons arising out of a vehicular collision, written notice of such proceedings together with a certified copy of the Summons, Statement of Claim, Police Reports, Medical Reports and all other relevant supportive documents shall be supplied to the Bureau within 30 days of the issuance of any legal process.

9. All claims against the Bureau shall be made within the period of three years from the date of accident or such further period as the Bureau may grant.

7. If the Bureau so requires, the Claimant shall subject to full indemnity from the Bureau as to costs that may be incurred, pursue with legal process until judgment, against any person whom he may have a cause of action.

8. The Claimant shall at all times, or from time to time comply with all requirements of the Bureau in relation to any matter which might give rise to a claim against the Bureau in terms of this Agreement.

9. That the award, to the extent of any compassionate payment or allowances if any, made by the Bureau pursuant to Clause 2 hereof, shall be ceded to the Bureau or its nominee.

10. This agreement shall not apply to the use of a vehicle:

(a) in respect of which there is a security complying with Section 93 of the Act.

(b) which has entered Malaysia through the frontiers with Thailand, Indonesia and Negara Brunei Darussalam unless such vehicle is registered in accordance with Section 7 of the Act, or with Section 6 of the Road Traffic Ordinance, 1961 of the Republic of Singapore or similar provisions of the relevant Acts of Indonesia and Negara Brunei Darussalam.

11. The Minister undertakes to ensure that every person hereinafter authorized as an Insurer for the purposes of part IV of the Act will undertake to become a member of the Bureau as a condition of such authorization.

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12. This Agreement may be terminated by the Minister at any time or by the Bureau on two years' notice without prejudice to the continued operation of this Agreement in respect of accidents occurring before the date of termination.

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13. In this Agreement:

(i) "Judgment" shall mean only judgment in favour of the person who suffered bodily injury, his dependants or legal personal representative.

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(ii) "Claimants" means persons injured or the dependants of persons killed through the use of motor vehicles which do not have in force a policy of insurance as required under Part IV of the Act or where such policy is ineffective for any reason other than the inability of the Insurer to make payment.

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The construction of the two agreements, together with the date of the accident, course of conduct of the parties during the tenure of the 1st agreement and 2nd agreement, and the date of judgment subsequently obtained in respect of the uninsured party had an important impact on the judgment arrived by us on the matter.

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In a nutshell much emphasis was placed by the appellant's counsel on the fact that the collision occurred during the tenure of the 1st agreement, and through the correspondence that ensued, that they were entitled to the full advantage of the 1st agreement, namely cl. (2) which would entitle the appellant in whose favour judgment was obtained of any sum payable thereunder in respect of the aforesaid adjudged liability.

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Clause (2) of the 2nd agreement, however, gives the Bureau, subject to cl. 10 an absolute discretion to make "Compassionate Payments" (emphasis is ours) or "Allowances" to persons injured, or to dependants of person killed in a motor accident where motor vehicle did not have a valid policy of insurance as required under Part IV of the Road Traffic Act 1987.

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We can well thus understand the anxieties of the appellants in their dogmatic persistence that their rights to recovery of damages were governed by the 1st agreement in view of the marked difference as to the payment between the 1st and 2nd agreement. However, on deliberation we are sanguine enough to hold that from the purport of both the 1st and 2nd agreement it was the intention of the contracting parties that the 1st agreement be terminated, and substituted by the 2nd agreement.

How Do We Come To This View?

From a plain heading of cl. 1(b) of the 2nd agreement we find it apparent, that there was an unequivocal intention of both the 1st and 2nd respondents to mutually rescind the 1st agreement.

Effect Of Such Recession Of The 1st Agreement In Law

The effect of such a recession by mutual agreement is clear, the first contract is extinguished. This is unlike a variation, when the old contract continues to exist in the altered form. See *Chitty on Contracts* above at para 1595. In the Privy Council's decision in *United Dominions Corp. (Jamaica) Ltd v. Michael Mitri Shouciar* [1969] 1 AC 340 Lord Devlin said "if the new agreement reveals an intention to rescind the old, the old goes, and if it does not, the old remains in force and unamended"

The position in s. 63 of our Contracts Act 1950 is similar. It provides "if parties to a contract agree to substitute a new contract for it, or to rescind, or alter it, the original contract need not be reformed".

Section 63, we note covers situations not only limited to the scope of novation, but also when parties have rescinded an earlier contract, and substituted a new one which we plainly see in the instance, from the tenor, and wording of the 2nd agreement. Flowing from this, it is our view that the 2nd agreement nullifies the effect of the 1st agreement making it inoperative. See *Ploygram Records Sdn Bhd v. The Search & Anor* [1994] 3 MLJ p. 127.

On the strength of aforesaid principles, the submissions of the appellant that they were entitled to their rights in damages as per the 1st agreement is "dead in the water", as there is no obligation on the 1st and 2nd respondents to perform any bargain or obligations under the 1st agreement.

There is also the issue of the effective date of the judgment entered in favour of the appellant against the uninsured party. This date militates against the submissions of the appellants that they were entitled to their claims under the 1st Agreement. The appellants took the court below through a discourse, about the proposals and offers that went back and forth between the appellants and the 1st respondent. But the fact remains here that for the purpose of the agreements in question, what is imperative for purposes of enforcement against the 1st respondent is a "judgment". This is clearly stated in cl. 2 of the 1st agreement, and cl. 2 and cl. 3 of the 2nd agreement. The effective judgment in this respect was dated 3 September 1993, which in effect took the judgment out of the compass of the 1st agreement that was deemed ineffective at that point of time. Further, cl. 3 of the 2nd agreement we wish to reinforce states as follows:

> 3. This Agreement shall apply to all claims preferred against the Bureau excluding any court awards which remain unsatisfied as at the 1st day of January 1992.

Viewed in its totality, it is "plain as a pikestaff bearing in mind the date of the judgment, *viz-a-viz*, 3 September 1993, the termination of the 1st agreement on 31 December 1991, and cl. 3 of the 2nd agreement mentioned above, the said judgment fell out of the sphere of the 1st and 2nd agreement.

There was also a veiled attempt judging from the affidavits of the appellant that the respondents, despite being aware of the existence of the 2nd agreement lulled the appellants into believing that their claims against the 1st respondent would be entertained in compliance with the 1st agreement. Appellant's counsel had laboured on this issue throughout their affidavits, and to this, we have picked one point out that puts paid to the argument. The letter of 12 May 1993 from the Motor Insurers Bureau which states that the Bureau is not responsible for any judgment which the appellant had intended to obtain against the uninsured party and further requesting them (appellants) to submit their claim forms pursuant to the 2nd agreement for the consideration of the 1st respondent. The claim forms in turn, were duly executed by the appellants, and by a letter dated 19 November 1993 a proposal was made by the 1st respondent to award a compassionate payment of RM8,200 to the 1st appellant and RM4,450 to the 2nd appellant.

This telling piece of evidence viewed, *viz-a-viz*, submitting claim forms pursuant to 2nd agreement against the backdrop of correspondence produced by the appellant shows us in no uncertain terms, that the appellants were in no way labouring under any impression held out by the 1st and 2nd respondents, that they were entitled to their claims under the 1st agreement. The submissions of the appellants on estoppel by conduct is with respect, a non-starter.

It is indeed an unfortunate situation here and our sympathies are with the appellants who have suffered grave injuries. However, the saying "Hard cases make bad law" comes to our mind in this instance. It is with a heavy heart that we dismiss the appeal with costs.

My learned brother Gopal Sri Ram JCA and my learned sister Rahmah Hussain JCA have read this judgment in draft and have expressed their agreement with it.